No. 86-975

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

BERNARD L. WILLIAMS, *Petitioner,*

vs.

OVERTON MANOR EAST HOMEOWNERS ASSOCIATION, INC., EUGENE G. DOUGLASS, TENNESSEE HOUSING DEVELOPMENT AGENCY, and NATIONAL MORTGAGE COMPANY, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

JOHN BARRY BURGESS*
LUCINDA S. MURRAY
GLASSMAN, JETER & EMBRY, P.C.
26 North Second Street
Memphis, Tennessee 38103
(901) 527-4673
LEO BEARMAN, JR.
First Tennessee Bank Building
Twentieth Floor
Memphis, Tennessee 38103
(901) 526-2000
STEPHEN G. BEARMAN
100 North Main Building
Suite 1109
Memphis, Tennessee 38103
(901) 526-5848
Attorneys for Respondents, Overton Manor East Homeowners Association, Inc., Eugene G. Douglass, and National Mortgage Company

*Counsel of Record

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

Whether the foreclosure of Petitioner's condominium pursuant to power of sale provisions contained in the master deed constitutes state action within the context of the 14th Amendment of the Constitution of the United States so as to state a claim under 43 USC §1983.

LIST OF PARTIES

The parties to this action are listed and styled herein in the same manner as in the Courts below:

Bernard L. Williams, Plaintiff and Petitioner,

–Overton Manor East Homeowners Association, Inc.
Defendant and Respondent,

–Eugene G. Douglass,
Defendant and Respondent,

–Tennessee Housing Development Agency,
Defendant and Respondent,

–National Mortgage Company*,
Defendant and Respondent,

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*National Insurance Agency is affiliated with Respondent, National Mortgage Company.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case presents the question of whether or not foreclosure by a common "power of sale" provision involves the state action necessary to support a claim under the 14th Amendment of the United States Constitution and 42 USC §1983 (1982).

These Respondents are in agreement with the facts as adopted in the District Court's Order of Dismissal. Appendix at A4-5. Petitioner, Bernard L. Williams, purchased the condominium in question in 1975. The Petitioner leased the condominium to residential tenants. The property was encumbered by a mortgage which was originally held by the Respondent, National Mortgage Company (NMC), and subsequently assigned to Respondent, The Tennessee Housing Development Agency (THDA). NMC thereafter acted as the servicing agent on behalf of THDA.

Respondent, Overton Manor East Homeowners Association, Inc. (OMEHA), was charged with the administration of the condominium complex of which Plaintiff's unit was a part. OMEHA had recorded the master deed establishing horizontal Property Regime which granted OMEHA power of sale and the right to foreclose upon condominiums whose owners were found to be in default in the payment of their assessments. In August, 1983, OMEHA determined that Petitioner was delinquent in the payment of his assessments and retained the Respondent, Eugene Douglass, to prepare a notice of a lien on the Petitioner's property, which was prepared on August 22, 1983. Notice was sent to the Petitioner at 3046 St. Dennis Place, Memphis, Tennessee, address of the Petitioner's condominium. On January 27, 1984, Respondent, Eugene Douglass, sent Petitioner a letter advising him that he, Douglass had been authorized by OMEHA to foreclose on the condominium for failure to pay back assessments and other fees and expenses due. The letter gave Petitioner seven (7) days in which to pay. On February 6, 1984, Respondent, Douglass, sent the Petitioner a second letter, the Petitioner having failed to respond to the letter of January 27. The second letter informed the Petitioner that Respondent, Douglass, was prepared to institute foreclosure proceedings, but gave the Petitioner one last chance to pay the assessments. On February 19, 1984, Respondent, Douglass, sent a third letter to the Petitioner, containing a copy of the Notice of Trustee's Sale which was being forwarded to the *Daily News*, a local newspaper, for publication. Again, this letter allowed the Petitioner one last chance to avoid foreclosure by paying the amount due, plus fees and expenses. Apparently, Petitioner did not respond, and the Notice was published in the *Daily News* on February 29, March 7, and March 13, 1984 pursuant to Tenn. Code

Ann. §35-501 *et seq.* (Presently Tenn. Code Ann §35-5-101 *et seq.* (1984)) The property was sold to Respondent, OMEHA, as sole bidder on March 22, 1984. On March 26, 1984 Respondent Douglass, notified Plaintiff of the sale. On April 27, 1984, a forceable entry and detainer warrant, issued by the Court of General Sessions of Shelby County, Tennessee, was served upon the Petitioner's tenant, who had continued to occupy the premises after the sale. Appendix at A4-5; Affidavit of Defendant Eugene G. Douglass R-26.

The United States District Court for the Western District of Tennessee held that the state action required to state a claim under the 14th Amendment was absent and the Complaint was dismissed for lack of subject matter jurisdiction. The Court further held that the Notice sent to the Petitioner by the Respondent, Douglass, was sufficient as a matter of law. Appendix at A6. Because the Sixth Circuit found no significant state involvement in the foreclosure proceeding, the judgment of the District Court was affirmed. Appendix at A1.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because the Courts below were correct in holding that there were no state actors nor state action involved in the foreclosure proceeding assailed by the Petitioner. All other Circuits that have addressed the issue presented in this case have likewise found that no state action is involved in foreclosure by power of sale. These holdings are also consistent with analogous decisions from this Court. In the case at bar, there is no state action present to support a claim under the 14th Amendment or 42 USC §1983. Therefore the Petition for Writ of Certiorari should be denied.

ARGUMENT

Reasons for Denying the Writ

I. The Decisions of the United States District Court and the Sixth Circuit Court of Appeals Are in Accord With Decisions From All Other Circuits Which Have Addressed the Issue Presented and With Prior Analogous Decisions From This Court.

The Petition for Writ of Certiorari filed in this cause accomplishes little beyond a reiteration of the arguments briefed by the Petitioner in the Sixth Circuit while improperly adding certain issues which were not briefed in the lower Courts. Furthermore, the Petition fails in its essential purpose, which is to provide this Court with "special and important reasons" for this Court to exercise its judicial discretion. Sup. Ct. R. 17.1. Instead of citing decisions from other Circuits which conflict with the holding of the Sixth Circuit in this case, as suggested by Supreme Court Rule 17.1(a), the Petitioner freely admits that the Circuits previously confronted with the constitutionality of power of sale foreclosures have uniformly found no state action. Petition for Writ of Certiorari at 11; *see Rank v. Nimmo*, 677 F.2d 692 (9th Cir. 1982); *Warren v. Government National Mortgage Association*, 611 F.2d 1229 (8th Cir. 1980); *Charmicor, Inc. v. Deaner*, 572 F.2d 694 (9th Cir. 1978); *Levine v. Stein*, 560 F.2d 475 (4th Cir. 1977); *Barrera v. Security Building and Investment Corporation*, 519 F.2d 1160 (5th Cir. 1975); *Bryant v. Jefferson Federal Savings and Loan Association*, 509 F.2d 511 (D.C. Cir. 1974); *Northrip v. Federal National Mortgage Association*, 527 F.2d 23 (6th Cir. 1975).

The Petitioner also claims that the holding of the Sixth Circuit Court of Appeals is inconsistent with this Court's

holding in *Lugar v. Edmondson Oil Company,* 457 U.S. 922 (1982). However, the case at bar clearly falls within the parameters established by *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149 (1978) and is easily distinguishable from this Court's decision in *Lugar.* The first distinction arises from the fact that the Court in *Lugar* was considering the constitutionality of a prejudgment attachment procedure which had been created by state statute. *Lugar v. Edmondson Oil Company,* 457 U.S. 922, 924 (1982). The power of sale exercised by Respondent, OMEHA, on the other hand, was a right created in the master deed. The power of sale was a right recognized at common law in *Bennett v. Union Bank,* 24 Tenn. 603 (1845). The Tennessee statute in question, Tenn. Code Ann. §35-5-101 (1984) (previously Tenn. Code Ann. §35-501) was merely an attempt by the Tennessee State Legislature to regulate and standardize the practice recognized at common law. See *Northrip v. Federal National Mortgage Association,* 527 F.2d 23, 27 (6th Cir. 1975). Likewise, horizontal property division and ownership existed in the State of Tennessee prior to passage of the Tennessee Horizontal Property Act, Tenn. Code Ann. 66-27-101 *et seq.* (1982). *Townes v. Cox,* 162 Tenn. 624 (1931).

Although never briefed by Petitioner below, he now attempts to raise the issue that reservation of lien and power of sale rights in the master deed somehow amount to state action. Once again Tenn. Code Ann. §66-27-101 *et seq.* (1982) simply recognizes and attempts to standardize a form of property ownership which existed at common law pursuant to *Townes v. Cox,* 162 Tenn. 624 (1931). Although not briefed below, Petitioner claims that Tenn. Code Ann. §66-27-116 (1982) and the lien alluded to therein constitutes state action; however, by the terms of this statute itself, a lien is created against the condominium only in

the event of a sale or conveyance of same by the owner. The statute does not require, authorize or even mention foreclosure. Appendix at A9.

Secondly, the case at bar can be distinguished because *Lugar* involved a pre-judgment attachment which was issued by a Court Clerk and executed by a local Sheriff. *Lugar v. Edmondson Oil Company,* 457 U.S. 922 (1982). The Court in *Lugar* stated that the participation of state officers in executing the levy made *Lugar* distinguishable from *Flagg Brothers* wherein the Supreme Court found no state action since there was no overt act by State officers. *Id.* at 926, 927; *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149 (1978). The case sub judice clearly falls within the parameters established by *Flagg Brothers* and is likewise distinguishable from *Lugar.* The finding of the Sixth Circuit in this case was therefore clearly consistent with prior holdings of this Court.

II. The Sixth Circuit and the District Court Correctly Held That There Was No State Action Involved in the Foreclosure Proceeding and Therefore Neither 42 USC §1983 nor the 14th Amendment of the Constitution of the United States Would be Implicated.

Although the Petitioner attempts to cloud the issues by raising additional questions not briefed in the Courts below and by making arguments which are irrelevant to the issue of state action, the simple fact remains that there was no significant state action to support a claim under the 14th Amendment as was determined by the District Court and Sixth Circuit Court of Appeals.

Petitioner claims that he was not a party to the master deed in question, however, he does not deny that the master deed was of record and that he took subject to its provisions

in the same fashion that he would have taken subject to any plat restrictions of record or other covenants running with the land. Furthermore, whether the Petitioner was or was not a party to the master deed is not relevant to the issue of state action.

Likewise, whether waived or not, Petitioner's right of redemption, which was not briefed below, bears absolutely no relation to the issue of whether or not state action was present in the foreclosure proceeding.

Contrary to arguments of the Petitioner, Tenn. Code Ann. §35-5-101 *et seq.* (1984), merely attempts to regulate and standardize practices which were recognized at common law. Contrary to contentions contained in the Petition for Writ of Certiorari at page 5, the statutory scheme does not prohibit additional notice but merely prescribes the minimum notice which must be sent. In fact, in the case at bar, additional notices were sent by the Respondent Douglass and the District Court held that the Notices sent by the Respondent Douglass were sufficient as a matter of law. Appendix at A6. Both of the lower Courts were correct in finding that the statute in question cannot supply the necessary element of State action to support a claim under the 14th Amendment.

Furthermore, as raised in the response on behalf of Defendant, Overton Manor East Homeowners Association, Inc., to the Plaintiff's Motion for Summary Judgment, the foreclosure of Petitioner's condominium and the subsequent use of the General Sessions Court to evict the Petitioner's tenant were two separate and distinct actions. (R-24) The District Court was correct in finding that the foreclosure was complete and the Petitioner had no ownership or possessory interest in the property when the General Sessions Court evicted the Petitioner's tenant and awarded

possession of the property. Even if the Petitioner had retained some interest in the property following the foreclosure, use of the General Sessions Court at that stage would not have amounted to state action sufficient to support a claim under the 14th Amendment. *Northrip v. Federal National Mortgage Association,* 527 F.2d 23, 29 (6th Cir. 1975) citing *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972).

Although the Petitioner claims that this is a problem of "immense proportions" and thereby attacks all power of sale provisions, he is forced to acknowledge that the Circuit Courts have uniformly found that state action is not present in this context and although the Petitioner attempts to fabricate state action where there is none, the fact remains that both the District Court and the Sixth Circuit were correct in their finding of no state action. Neither the mortgage servicer, NMC, nor holder, THDA, a government agency, had involvement in the foreclosure process and, in fact, had no knowledge of the proceeding until after it was completed. (Affidavit of Aubrey B. Vaughn R-23) Therefore, as held below, "the involvement of THDA . . . [was] simply fortuitous" and does not constitute state action. Appendix at A5. The District Court was also correct in finding that the Notices sent were sufficient as a matter of law to satisfy the requirements of the 14th Amendment. Furthermore, it is important to note that if this Court were to find State action in the power of sale context, the Federal Courts of this land would be opened to a plethora of mortgage litigation arising out of private agreements, in actuality involving no state action, which would otherwise be properly decided in the State Courts. In addition, a decision contrary to those which are heretofore uniform across the various Circuits would cause great uncertainty with regard to millions of mortgages,

trust deeds and similar instruments which contain valid power of sale provisions. The Federal Courts would be opened to a new flood of litigation.

CONCLUSION

These respondents respectfully submit that the Petition for Writ of Certiorari has failed to demonstrate "special and important reasons" which would justify the exercise of this Court's discretion. Therefore, this Petition for Certiorari should be denied.

JOHN BARRY BURGESS*
LUCINDA S. MURRAY
GLASSMAN, JETER & EMBRY, P.C.
26 North Second Street
Memphis, Tennessee 38103
(901) 527-4673

LEO BEARMAN, JR.
First Tennessee Bank Building
Twentieth Floor
Memphis, Tennessee 38103
(901) 526-2000

STEPHEN G. BEARMAN
100 North Main Building
Suite 1109
Memphis, Tennessee 38103
(901) 526-5848

Attorneys for Respondents, Overton Manor East Homeowners Association, Inc., Eugene G. Douglass, and National Mortgage Company

*Counsel of Record